

**Allston-Rieder v Schwartzman**

2005 NY Slip Op 30459(U)

April 1, 2005

Supreme Court, New York County

Docket Number: 103016/03

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Pecolia Allston-Rieder and Edward Rieder

INDEX NO. 103016/03

MOTION DATE 3/10/05

MOTION SEQ. NO. 004

- v -

Sergio Schwartzman, M.D., et al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: 2  Yes  No

Upon the foregoing papers, it is ordered that this motion by plaintiffs, pursuant to CPLR 3103(a), for a protective order regarding disclosure of their experts' <sup>1</sup> qualifications under CPLR 3101(d); the cross-motion of defendants Sergio Schwartzman, M.D. and Hospital for Special Surgery ("HSS"), pursuant to CPLR 3101(d), to compel further disclosure of plaintiffs' experts' qualifications <sup>2</sup>; and the cross-motion of defendants George Burak, M.D. and Hudson Valley Bone and Joint Surgeons, pursuant to CPLR 3101(d), to

<sup>1</sup>At the time this motion was made, plaintiffs had served only one expert witness response, for a surgical oncologist. Since then plaintiffs have served two additional expert responses, for an orthopedic surgeon and a medical oncologist, respectively. All three responses follow the same format.

<sup>2</sup>Although the specific relief requested in this cross-motion is for further disclosure of plaintiffs' experts' professional qualifications, Dr. Schwartzman and HSS also seek to compel plaintiffs to supplement their disclosure to differentiate among the three experts for whom plaintiffs have provided nearly identical substantive facts and opinions.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

compel further disclosure regarding plaintiffs' experts' qualifications, as well as the substance of their facts and opinions, are decided as follows:

Plaintiffs brought their motion for a protective order after a response they served to defendants' demands for expert disclosure in this medical malpractice action was rejected as insufficient. Plaintiffs' response stated that:

Plaintiffs intend to call, as an expert witness upon the trial of this action, a medical doctor currently licensed to practice medicine, who is Board certified by the American Board of Surgery, and who practices oncologic surgery. Said expert obtained a medical degree from New York Medical College, Valhalla, New York, performed a surgical internship at a hospital in New York State, and performed residencies at hospitals in New York State and Michigan. Said expert has performed a clinical fellowship in surgical oncology, a research fellowship in surgery and a research fellowship in oncology.

Plaintiffs assert that the disclosure they have provided more than adequately apprises defendants of plaintiffs' experts' qualifications and allows defendants to prepare for trial, and that the only reason defendants seek more disclosure is to discover the identity of plaintiffs' experts, in contravention of CPLR 3101(d) (1) (i).

Cross-moving defendants contend that they rejected plaintiffs' response because the qualification disclosure is inadequate and the failure to disclose the experts' qualifications in "reasonable detail" violates the governing statute. Thus, counsel for Dr. Burak and Hudson Valley Bone and Joint Surgeons demanded in a November 30, 2004 letter that plaintiffs disclose:

where and in what areas your expert performed his residencies, where and in what areas of medicine your expert performed his internships and fellowships, states of licensure, and board certifications held, specifying the areas of certification.

In a letter dated December 12<sup>th</sup>, counsel for Dr. Schwartzman and HSS sought at a minimum the state or states where the expert is licensed to

practice medicine. However, citing the Appellate Division, Second Department's 2002 decision in Thomas v. Alleyne (302 AD2d 36), counsel also sought "full" disclosure of all qualifications of the expert, including location and dates of internships, residencies and fellowships, as well as publications (any articles or portions of texts authored by the expert that may be relevant to the issues in the case), unless plaintiffs made a specific showing by motion for a protective order that information leading to the identification of the expert would result in "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice."

Counsel's letter refers to the two-part test enunciated in Thomas that requires plaintiffs who wish to avoid disclosing in "reasonable detail" the expert qualification information to which defendants are "presumptively entitled" under CPLR 3101(d) (1) (i) to demonstrate "(a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' (CPLR 3101[a])" (id., at 38).

As I have already indicated in an unpublished decision dated January 2, 2003 in Cianelli v. Dziedzic (Index No. 116212/99), issued shortly after the Second Department decided Thomas, I agree with the Second Department's assessment that the balancing test it had previously enunciated in Jasopersaud v. Rho (169AD2d 184) was "unworkable and inconsistent with the terms" of CPLR 3101(d) (1) (i). That balancing test instructed trial judges to " 'weigh the \*\*\* competing concern[s]' of (1) the defendant's interest in full disclosure, and (2) the plaintiff's interest in preserving the anonymity of his or her expert" (Thomas, supra, at 42). The Jasopersaud court had found that the defendant's request for the medical school attended by plaintiff's expert, the expert's board certifications, areas

of special expertise, jurisdictions of licensure and the locations of internships, residencies and/or fellowships - - the same type of information except for the dates that defendants here are seeking - - were proper inquiries bearing on the "qualifications" of the expert (169 AD2d at 188).

Because of ever expanding computer technology which makes it much easier for even the "bare bones" information" (Deitch v. May, 185 Misc.2d 484, 487) found in Jasopersaud and in Yablon v. Coburn (219 AD2d 560)<sup>3</sup>, the most recent Appellate Division, First Department decision on this issue, to be proper inquiries susceptible to revealing an expert's identity, there had been a growing trend among courts toward requiring less disclosure of an expert's qualifications (see e.g. Thompson v. Swlanteck, 291 AD2d 884; Deitch, supra; Duran v. New York City Health and Hospitals Corp., 182 Misc.2d 232, lv. withdrawn 282 AD2d 985; Brosnan v. Shaffron, NYLJ, May 3, 2001, at 23, col. 6).<sup>4</sup> However, I believe, as does the Thomas court, that "this technological change points to the futility of attempting to conceal the identity of expert witnesses in medical malpractice cases" (302 AD2d at 43). Instead of being forced to play the game of "In how few qualifications can I name your expert?", all parties should be required to give full disclosure of each expert's qualifications to help promote settlement or to prepare for

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<sup>3</sup>Citing Jasopersaud, the First Department in Yablon (supra), affirmed the trial court's order directing plaintiff to disclose her expert's medical school, residency and fellowships as well as the states in which the expert was licensed.

<sup>4</sup>As is pointed out by plaintiffs, since Thomas, at least two trial courts outside of the Second Department, one in Albany and the other in the Bronx, have restricted the expert information a plaintiff must disclose to preserve the anonymity of the expert's identity prior to trial (see Hall v. Shah, Sup Ct, Albany County, July 2003, Malone, J., Index No. 10809/02; Hara v. Levine, 2003 NY Slip Op 50615[U]). However, three of my colleagues in New York County and one in the Bronx, have, like me, followed the Thomas court's more expansive approach to disclosure (see Scher v. St. Luke's-Roosevelt Hosp., NYLJ, Jan. 28, 2003, at 18, col.4; Muniz v. Our Lady of Mercy Medical Center, 2003 NY Slip Op 50910[U]; Arellano v. NYC Health and Hospitals Corp., 2004 NY Slip Op 51388[U]; Schiffer v. Speaker, 2004 NY Slip Op 51768[U]).

trial.<sup>5</sup> Short of such full disclosure by all parties, plaintiffs seeking to avoid disclosing in "reasonable detail" the expert qualification information to which defendants are "presumptively entitled" under CPLR 3101(d) (1) (I), should be required to meet the two-part Thomas test.<sup>6</sup>

Plaintiffs have not even attempted to make such a showing here. Instead, they argue that the Thomas test imposes on them "the excessive burden of proving that the revelation of the expert witness' identity would expose the expert to ridicule, harassment and expense [and] would effectively remove all protections afforded the expert witness because few plaintiffs could provide such objective proof absent revelation of the expert's identity first" (Reply Affirm. and Affirm in Opp., ¶ 11; underlining in original). Plaintiffs' argument is unpersuasive because plaintiffs may make such a showing without revealing the expert's name by redacting the name from any affidavit submitted in support of a motion for a protective order or by submitting evidence to the court in camera. Accordingly, plaintiffs' motion for a protective order is denied.

In view of the foregoing, defendants' cross-motions to compel plaintiffs to provide the information demanded concerning plaintiffs' medical experts' qualifications is granted to the extent that plaintiffs must provide,

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<sup>5</sup>When I suggested to counsel at the oral argument of these motions that they exchange their respective experts' CV's, defense counsel was willing to do so but plaintiffs' attorney refused.

<sup>6</sup>As I stated in my Cianelli decision (at fn3): "While this new test is a step in the right direction, I would urge the Legislature to re-examine CPLR 3101(d) (1) (I) in light of the "flourishing procedural motion practice in medical malpractice litigation that encourages unfair surprise, squanders the resources of the parties and the court and ultimately diverts cases from an orderly adjudication on their merits" (Richard S. Basuk, "Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is it Time to Take Off the Blindfolds?", 76 NYUL Rev. 1527, 1542 [November 2001], which, I believe, will continue even under the new test, and to adopt the language of the Federal Rules of Civil Procedure which permits the broadest expert disclosure."

within 20 days of service of a copy of this order with notice of entry, the experts' states of licensure, board certifications with dates granted, names of medical schools, dates and locations of internships, residencies, internships and fellowships, areas of expertise including subspecialties and a list of the expert's publications, if any.

That branch of the defendants' cross-motions which seeks a more specific description of the substance of the facts and opinions on which each expert is expected to testify, distinguishing the testimony of the three experts plaintiffs' intend to call as witnesses is denied. Defendants have not demonstrated any entitlement to such relief, and in essence are seeking a ruling that plaintiffs' experts' testimony is cumulative, a ruling which should be reserved until trial.

ORDERED that plaintiffs' motion for a protective order is denied; and it is further

ORDERED that defendants' cross-motions to compel are granted only to the extent of directing that within 20 days of service of a copy of this order with notice of entry, plaintiffs are to disclose information not already provided concerning their experts' states of licensure, board certifications with dates granted, names of medical schools, dates and locations of internships, residencies, and fellowships, areas of expertise including subspecialties and a list of the experts' publications, if any; and it is further

ORDERED that defendants' cross-motions to compel are denied in all other respects.

**FILED**

APR - 5 2005

Dated: April 1, 2005

SA-A NEW YORK COUNTY CLERK'S OFFICE

J.S.C.

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